IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

F.A. No. 615 of 2001
(Old No. 275/1978)

Date of decision :- 11-7-2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :- 11-7-2006 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OR UTTARANCHAL AT NAINITAL

First Appeal NO.615 of 2001
(Old No. 275/1978)

State of Uttar Pradesh. ….. Appellant.

Versus

Sri Fateh Singh Panwar son of Late Upendra Singh, aged about 55 uears, resident of village Kholgarh, Patti Oand, tehri Garhwal. …… Respondent.

Sro Mamd Prasad, learned Standing counsel for the Appellant.
None for the respondent.

Dated: 11.07.2006.

HON'BLE J. C. S. RAWAT, J.

1. This is an appeal against the judgment and decree dated 18.05.1978 passed by Sri N.N.Chadha, the then District Judge, Tehri Garhwal by which the learned District Judge had decreed the suit of the plaintiff for Rs.17,942.14p. with proportionate costs against the defendant. He further directed that the defendant shall pay the pendente-lite and further interest on the amount till the reasilation @ 6% per annum. It was further directed by the learned District Judge that the defendant shall also pay interest at the contracted rate on the security deposit of Rs.11,417.80p till the date of the suit.

2. The brief facts for the disposal of this appeal are that the plaintiff filed a suit for the recovery of Rs.29,853.80p from the defendant/department. According to the allegations made in the plaint plaintiff took a contract from the defendant department for the construction of 5 meters wide road alongwith Bhagirathi river and it was Job No.4 in between kilometers 3780 to 4600. The work was to commence with effect 1.1.1974 and was to be completed to the extend period of 30.9.1974. The security of Rs. 26,000/- was deposited with the department as the earnest

money for the construction of the said work according to the terms of the contract. The said construction work consisted of two parts. The first part was valued at Rs. 1,04,000/- and the second part of the contract was to be completed after receiving the separate orders of the department. The plaintiff had also alleged that he completed the said work within the stipulated period and the said work was completed in the supervision of the Officers of the department. According to the plain allegations the plaintiff gave a notice to the defendant/department to measure the entire work and a date 11.11.1974 was fixed. But according to the plaintiff the said measurement was not conducted on that date and the measurements were conducted on 4.12.1974 and on the said date the plaintiff was not persent and he was not given any notice. When he came to know that the said measurements had been conducted on 4.12.1974 he did not accept the said measurements and asked them to pay a sum of Rs. 6524.24p. on the above of the measurements. He further claimed that according to him he was entitled to a sum of Rs. 14,263.00 for the remaining work and he further claimed that a sum of Rs.1000/- had been deducted extra by the department for the prices of the articles supplied without any reason. When the department did not pay the said amount, a notice under section 80 CPC was given to the department. When the department did not pay any heed, hence he filed this suit.

3. The defendant contested the suit and alleged in his written statement that the measurements of the work were taken by the Junior Engineer on 4.12.1974 and these measurements were recorded in the measurement book. It was further alleged that the measurements were taken in presence of the plaintiff's son who had been authorized to

look after the work of the plaintiff at the spot. The defendant further alleged that the plaintiff had left incomplete work to the tune of Rs. 13,938.32p and a penalty of 3% amounting to Rs. 3425.22p was levied on the plaintiff for not completing the work in accordance with the contract and leaving the defect thereupon. It was further alleged that the measurements recorded on 4.12.1974 were not in accordance with the levels taken on 11.11.1974 and the bills as well as the measurements were cancelled. The department further took the measurements on 31.7.1975 and recorded the measurement in their measurement book. The defendant also alleged that the plaintiff is not entitled to recover any of the disputed amount. The defendant further clarified that the plaintiff was entitled to Rs.300/- on account of the value of the work done, Rs.430/- on account of the excess payment of higher charges for machinery and Rs.16/- on account of excess charges for detonators and Rs. 11,417.80p. on account of security deposits. The department further alleged that the plaintiff was only entitled to a sum of Rs.12,164.64p. minus Rs.3425.22p. on account of the compensation. The department ultimately prayed for the dismissal of the suit.

4. The learned trial court, after appraisal of the pleadings of the parties, framed the necessary issues.

5. The plaintiff, in support of his case, examined Fateh Singh (himself) as PW 1 and Mahipal Singh, the son of the plaintiff as PW 2 to support the averments made in the plaint. The defendant also adduced the evidence of DW 1 Madan Gopal Kapoor who was the Assistant Engineer at the relevant time and DW 2 P.P. Goel who was Junior Engineer at the relevant time and was also supervising the work. Mr. M.G.Kapoor was also the Engineer Incharge of the work at

the relevant time. The defendant also adduced the measurement books recorded after July, 1975.

6. After appraisal of the evidence as well as the pleadings of the parties, the learned tiral court came to the conclusion that the plaintiff would be entitled to a sum of Rs. 6524.34p. on account of the work done plus Rs. 11,417.80p. on account of the security deposits totaling an amount of Rs. 17.942.14p. The learned further awarded interest @ 6% per annum, pendente-lite and future to the plaintiff.

7. I have heard the learned Standing counsel Sri Nand Prasad. The respondent had not been appearing his presence inspite of the service of the notice from this Court.

8. The learned counsel for the State contended that considering the issue No.1,2 and 3 had erroneously stated in his judgment that it is admitted to the defendant that it was on 4.12.1974 that on the basis of the level taken on 11.11.1974, the measurements were recorded in the measurement book. The statement is just contrary to the case set up by the defendant/appellant in the written statement. It was further conteded that the measurements recorded on 31.7.1975 had been done on the basis of the levels recorded in presence of the plaintiff on 11.11.1974. The learned Standing counsel further contended that the measurements taken on 31.7.1975 represent the correct situation of the work done by the plaintiff/respondent. He further contended that the work of the plaintiff/respondent was not upto the mark so fresh measurements were conducted on the later date.

9. I have gone through the entire record of the appeal with the help of the Stainding Counsel. According to the assertation of the plaintiff, the plaintiff completed his work within the stipulated period in accordance with the contract

and his work was not measured on 11.11.1974 and the department had not completely measured the entire work and had not paid the entire amount of the work done by him. The plaintiff has further stated that the plaintiff had completed the work upto the extent which he had claimed in the plaint. The defendant had denied that he did not complete the work within the stipulated period. The plaintiff had examined himself in this regard.

10. it is to be examined as to what was the measurement at the relevant time on the basis of which the work of the plaintiff can be assessed. The plaintiff had stated in his evidence that he was not accepting the measurements done by the department on 4.12.1974 and the plaintiff was also stating that there were short comings in the measurements made by the department on 4.12.1974 and he was praying for rectifying those mistakes. Now it was for the plaintiff to show what was the exact value of the work done by him. The plaintiff was unable to show that there was any else value of the work done by him. He has alleged that this value of the work done should be taken as Rs.14,238.00 but it has no independent basis with the plaintiff. The plaintiff had not filed any independent measurement by any independent person. When the parties had adduced the evidence, the burden of proof loses its importance. The evidence on record had to be assessed on the basis of the available evidence. In absence of any independent evidence by the plaintiff the court would have necessarily to follow on the measurements which had been recorded in the measurement book either on 4.12.1974 or of a later date.

11. It is not disputed that the work was to commence on 1.1.1974 and it was to be completed by 30th September, 1974. The plaintiff has asserted that he had completed the

said work within the stipulated period and he also served a notice to measure the said work on 11.11.1974. However, the defendant had given the evidence that they measured the said work on 4.12.1974 and the measurement of the said work had been recorded in the measurement book. It is not disputed that the earliest measurements recorded on 4.12.1974 were recorded in the measurement book by the Junior Engineer P.P. Goel and the said measurements had been checked by the Assistant Engineer Incharge Mr. M.G.Kapoor. he had also found that the said measurements were correct. Mr. M.G.Kapoor who appeared as DW 1 had stated in his evidence that he was the Engineer Incharge of the work at the relevant time and he admitted in his evidence that he had checked these measurements and had signed in token of their being correct. The Junior Engineer P.P. Goel also appeared before the trial court as DW 2 and he had stated that he recorded the measurements in his measurement book and he has very clearly stated that while recording the measurements in the measurement book he took the length, width, height etc of the completed work and he recorded each and every thing on 4.12.1974. He has further stated that the said measurement books were produced before DW 1 M.G.Kapoor and he also checked the said measurements on the same day and he signed in token of their being the correct measurements. DW 1 M.G.Kapoor has categorically stated in his evidence that he had physically verified the measurements. His testimony with regard to the fact that there were short comings in the said measurements and hence the said measurements were cancelled and a fresh measurement was ordered by him. The learned trial court had also observed while delivering the judgment that the defendant had not chosen to place the order of cancellation

on the record. In fact, according to the plaintiff's evidence it was not certain if the measurements of July, 1975 was done on the spot or not. The learned trial court also referred the paragraph No.13 of the evidence of DW 1 M.G. Kapoor. DW 1 had stated that measurements had actually been done on 4.6.1975 and had been checked by him on 29.7.1975. He was not able to explain how the difference arose when the measurements recorded on 4.12.1974 and were also checked by him and also recorded his correctness on the measurements and how he is stating that the measurements recorded in 1975 were checked and found them tallying in the measurement book of July, 1975. There was reservations while giving the evidence of DW 1 to explain the discrepancy and he was not able to explain the discrepancy and so there was a variation in his statement. DW 2 Mr. P.P. Goel has categorically stated that the measurements were not done on the spot on 4.6.1975. This evidence shows that what the department was now stating before the court about the further defects having been found could not be accepted to be correct. The evidence of Mr. P.P. Goel entirely contradicts the evidence of DW 1 Mr. M.G. Kapoor. It is the case of the defendant that the second measurements were taken in the month of July, 1975 and it is also admitted case of the parties that the work to be completed by 30th September, 1974. The first measurements were taken on 4.12.1974 and the same had been recorded in the measurement book. It is also the case of the defendant tha the plaintiff pointed out certain mistakes in the calculation. When the said measurements were questioned so the fresh measurements necessitated in the month of July, 1975. The Executive Engineer Incharge had passed on order for the re-measurement. The said order is not on record. The suppression of the said order also

reveals that there was no order on record as has been alleged by DW 1 Mr. M.G.Kapoor. according to the terms of the contract of the agreement, the work had to be executed in accordance with the specifications laid down and that the contractor was to be refunded security deposit after the expiry of six months from the date of the completion of the work and taking over by the department. It is also in the schedule of the contract that running bills ordinarily had to be paid for the continuous length completed as per requirement of the drawing etc. in case any defect being left by the contractor in any case the Engineer Incharge may pay a running bill at such reduced rate as in his opinion will meet the cost of their rectification. In case the contractor fails to complete the work of the Job as stipulated in the contract the quality of the work left incomplete will be measured as existing at the site. It is also a condition in the Schedule 'B' that the contractor may hand over to the department length of the road after completing hill site cutting, the responsibility for Monsoon damage in length made over to the department will rest with the department. It is also provided in the contract that after six months' time the security furnished by the contractor had to be returned. It could not be retained in any case. This means that the contractor could only be called upon within this period to rectify all the defects so that the value of the defects if not rectified could be taken from the security amount. The above terms of the contract unequivocally reveals the the contract entered between the parties there was no other period fixed on the basis of which it could be said that the liability of the plaintiff accounted beyond a period of six months from making good any deficiency or defect in the work. During this period the plaintiff could be called upon to remove failing which his

security be forfeited and he was subjected to penalty in this regard. The work was to complete on 30.9.1974 and, as such, the period to remove the defect was only upto the month of March, 1975. The said defect which have been pointed out was made available to the plaintiff on 29th July, 1975 which was beyond the period of the contract. Thus, the liability of any defect can not be fastened upon the plaintiff. It is also provided in the terms of the agreement that the liability that the responsibility for Monsoon damage in length made over to the department will rest to the department. Admittedly the work was re-measured in the month of July,1975. The various widths and lengths which were found short could only be referred to the chances in the situation by Monsoon or other natural phenomena basis, the contractor was not, at all, liable after March, 1975.

12. It is very pertinent to mention here that the work was measured on 4.12.1974 and it is also in the evidence that Mr. P.P. Goel (DW 2) had recorded the measurement book. He had categorically stated in his evidence that he recorded the length, width and height etc or the said work was also verified by the Engineer Incharge and he also verified the said work at the spot. It he would have any reservation with regard to the defects he could have very well recorded those defects in his endorsement And he could have directed at the same time to remove these defects at the spot. The Engineer Incharge had not taken this recourse at the time of the verifying the first measurement. The Engineer Incharge had lateron mysteriously ordered the re-measurement of the said work. However, the same order is not on record. The theory which had been propounded by the department is entirely unbelievable. If the work had been handed over to the department the defects would not have

been recorded in the measurement book by the Officers of the department dated 4.12.1974 and no defects were pointed out by the contractor till March,1975 would lead to take an inference that the contractor had completed the work in accordance with the measurements recorded on 4.12.1974. The learned trial court had rightly relied upon the measurements recorded on 4.12.1974. I am completely in agreement with the findings of the learned trial court and I do not find any substance raised by the learned Standing Counsel.

13. In view of the foregoing discussion, I am of the view that the appeal lacks merit and is liable to be dismissed.

14. The appeal is dismissed. Costs easy.

(J.C.S.Rawat, J.)

11.07, 2006
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